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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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HARNINDER SINGH,

Plaintiff and Appellant,

v.

CITY OF SACRAMENTO,

Defendant and Respondent.

C062733

(Super. Ct. No.  
342008000013471CUWMGDS)

Plaintiff Harninder Singh has a business license issued by defendant City of Sacramento (the city) for the retail sale of tobacco products.

In April 2007, undercover police officer James Lovano and a 17-year-old decoy employed by the city went into the Discount Cigarette Store on Mack Road. The decoy purchased cigarettes from Singh, the owner of the store, who did not ask the decoy his age or for identification.

Singh's license was suspended for 30 days for the sale of cigarettes to a minor pursuant Sacramento City Code section

5.138.010 et seq. (city tobacco ordinance).<sup>1</sup> He sought and obtained an administrative appeal, and an evidentiary hearing was held before a hearing officer who affirmed the suspension.

Singh filed a petition for writ of prohibition/mandate in the trial court, seeking review of the administrative decision on the following three grounds: (1) the city tobacco ordinance is preempted by state law; (2) the city's enforcement action violated state law; and (3) and the city denied him due process. The trial court entered judgment against Singh.

Singh filed a timely notice of appeal and reraises these issues before us. We affirm the judgment.

#### DISCUSSION

##### I

##### *The City Tobacco Ordinance Is Not Preempted By State Law*

Singh contends the city tobacco ordinance is preempted by state law, specifically, the Stop Tobacco Access to Kids Enforcement Act (STAKE Act) (Bus. & Prof. Code, §§ 22950-22959) and Penal Code section 308, prohibiting the sale of cigarettes to minors.

The principles governing state law preemption of local ordinances are as follows: Under article XI, section 7 of the California Constitution, a city may make and enforce within its limits all local ordinances not in conflict with general state laws. (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061,

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<sup>1</sup> The city tobacco ordinance is attached as an appendix to this opinion.

1067 (*O'Connell*).) A conflict exists if the local ordinance  
"````duplicates, contradicts, or enters an area fully occupied  
by general law, either expressly or by legislative  
implication."````" (*O'Connell*, at p. 1067, italics omitted.)

A

*The City Tobacco Ordinance Does Not Duplicate State Law*

"A local ordinance *duplicates* state law when it is  
'coextensive' with state law." (*O'Connell, supra*, 41 Cal.4th at  
p. 1067.) *In re Portnoy* (1942) 21 Cal.2d 237, provided such an  
example, where a county ordinance imposed the same criminal  
prohibitions on gambling activities as found in the Penal Code.  
(*Portnoy*, at p. 240.)

Here, the city tobacco ordinance does not duplicate either  
the STAKE Act or Penal Code section 308.

The city tobacco ordinance regulates the issuance and  
renewal of business licenses to tobacco retailers within the  
city. (Sac. City Code, §§ 5.138.010 (L), 5.138.040 (A),  
5.138.060.) It provides for license suspension or revocation  
for violating tobacco-related laws. (*Id.*, § 5.138.110.)

The STAKE Act provides for civil penalties ranging from  
\$400 to \$6,000 against any person, firm, or corporation that  
furnishes tobacco products to minors. (Bus. & Prof. Code,  
§ 22958.) The money collected is usually deposited into the  
state treasury and credited to a special account established  
under the STAKE Act. (*Id.*, § 22953, subd (a).)

Penal Code section 308 provides for either a criminal  
action for a misdemeanor or a civil action punishable by a fine

ranging from \$200 to \$1,000 against any person, firm, or corporation that furnishes tobacco products to minors. (Pen. Code, § 308, subd. (a)(1).)

From this comparison, it is clear the city tobacco ordinance, the STAKE Act, and Penal Code section 308 do not duplicate one another. The city tobacco ordinance deals with license suspension and revocation, the STAKE Act deals with civil penalties, and Penal Code section 308 deals with criminal penalties.

B

*The City Tobacco Ordinance Does Not Contradict State Law*

"A local ordinance *contradicts* state law when it is inimical to or cannot be reconciled with state law."  
(*O'Connell, supra*, 41 Cal.4th at p. 1068.) *Ex parte Daniels* (1920) 183 Cal. 636 provided such an example where a City of Pasadena ordinance was struck down because it set the maximum speed limit for vehicles at 15 miles per hour, whereas state law set the maximum speed limit at 20 miles per hour. (*Ex parte Daniels*, at pp. 637, 641-648.)

Here, the city tobacco ordinance does not contradict state law. The purpose of the ordinance is to "encourage responsible tobacco retailing and to discourage violations of tobacco-related laws . . . but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalty provided for violations."  
(Sac. City Code, § 5.138.020.) It provides for license suspension or revocation for violating tobacco-related laws.

(*Id.*, § 5.138.110.) As our Supreme Court has explained, a city's "right to utilize its licensing power as a means to regulate businesses conducted within its borders can scarcely be disputed." (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 296.) "Most licensing ordinances have a direct impact on the enforcement of state laws which have been enacted to preserve the health, safety and welfare of state and local citizens. This fact does not deprive a municipality of the power to enact them." (*Cohen*, at pp. 298-299.)

This language in *Cohen* was cited in *Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383 to uphold a city ordinance that prohibited the sale of cigarettes by vending machines against a challenge by an operator who claimed the ordinance was preempted by Penal Code section 308. (*Bravo Vending*, at pp. 383, 411.) The *Bravo* court explained, "section 308 has preempted the regulatory field of the penal aspects of sales of cigarettes to minors. [The city ordinance] neither expands nor attempts to limit the extent to which such sales are proscribed. Instead, it is intended to discourage violations of the statutory prohibition by regulating the manner in which cigarettes are made available for sale. Accordingly, we conclude that [the city ordinance] is not preempted by section 308." (*Bravo Vending*, at p. 412.)

The same is true here. The city tobacco ordinance does not expand or limit the extent to which tobacco sales are proscribed. Rather, it is intended to discourage violations of

the law by suspending the retailer license of those caught selling tobacco to minors. There is no contradiction.

C

*The City Tobacco Ordinance Does Not Enter*

*A Field Fully Occupied By State Law*

A local ordinance enters a field fully occupied by state law when the Legislature either expressly manifests its intent to occupy the legal area or impliedly occupies the field.

(*O'Connell, supra*, 41 Cal.4th at p. 1068.)

Our Supreme Court has rejected the argument the Legislature intended the STAKE Act and Penal Code section 308 to comprise a comprehensive and exclusive scheme for combating the sale of tobacco to minors. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 567-574.) There, the court found that a private corporation could maintain an action against the defendant grocery store under the unfair competition law on behalf of the general public to prevent the store from selling cigarettes to minors in violation of Penal Code section 308. (*Stop Youth Addiction, Inc.*, at pp. 558, 572.) That Penal Code section 308 and the STAKE Act did not contain an express private right of enforcement did not mean that suit under the unfair competition law was preempted or impliedly repealed. (*Stop Youth Addiction, Inc.*, at p. 572.)

Here, the situation is straightforward because the Legislature had specifically provided for enactment of local licensing laws that provide for the suspension or revocation of business licenses for violations of state tobacco laws: "Local

licensing laws may provide for the suspension or revocation of the local license for any violation of a state tobacco control law.” (Bus. & Prof. Code, § 22971.3.) As such, the city tobacco ordinance does not enter a field fully occupied by state law.

## II

### *The City Was Not Enforcing The STAKE Act, So It Was Not Bound By The Act’s Provisions*

Singh contends the city’s enforcement action did not comport with the STAKE Act because the city used a decoy who was 17 and the STAKE Act requires decoys who are 15 or 16 years old. (Bus. & Prof. Code, § 22952, subd (d)(1).) Singh’s argument is neither here nor there, because the city was not enforcing the STAKE Act.

The question of whether the city was enforcing the STAKE Act is a question of fact, and we defer to the trial court’s factual findings if supported by substantial evidence. (See *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800.) Here, the trial court found the sting operation in April 2007 was performed pursuant to the city tobacco ordinance and not the STAKE Act. There was substantial evidence to support this factual finding. Officer Lovano testified he was conducting a youth decoy operation under the city’s tobacco enforcement program. The notice of suspension stated that Singh’s tobacco retailer license was being suspended for a violation of Sacramento City Code section 5.138.100. The same notice informed him the penalty would be suspension of his business

license for 30 days, which is a remedy for violation of the city code, not the STAKE Act. (Compare Sac. City Code, § 5.138.110 (A)(1)) [first license violation is license suspension for 30 days] with Bus. & Prof. Code, § 22958 [first violation is civil penalty ranging from \$400 to \$600].) On this record, there was substantial evidence the city was enforcing its tobacco ordinance.

### III

#### *There Was No Due Process Violation*

Singh contends his right to due process was violated by failure to produce the minor decoy for examination during the hearing and the reliance on "rank hearsay" to establish the minor's age and identity.

"The express constitutional right to confrontation is confined to criminal proceedings.'" (*Seering v. Department of Social Services* (1987) 194 Cal.App.3d 298, 304.) Nevertheless, in a civil proceeding, a party has a due process right under the Fifth and Fourteenth Amendments to the federal Constitution to cross-examine and confront witnesses. (*Seering*, at p. 304.) This right includes general notions of procedural due process, i.e., notice and the opportunity to be heard. (*Mullane v. Central Hanover B. & T. Co.* (1950) 339 U.S. 306, 314 [94 L.Ed. 865, 873]; *Seering*, at p. 304.) It does not include face-to-face confrontation with witnesses who are minors. (See, e.g., *In re Mary S.* (1986) 186 Cal.App.3d 414, 419-421 [no such right in a juvenile dependency proceeding]; *Seering*, at pp. 298, 304



[no such right in a daycare licensing administrative appeals hearing].)

Here, Singh received the procedural due process to which he was entitled. On May 1, 2007, he was given written notice of the suspension of his tobacco retailer license. The notice informed him he could appeal the decision to suspend his license by submitting a written appeal no later than 10 days from the date of service of the notice. It delineated the four items the appeal must contain. Singh timely complied, resulting in the May 14, 2008, appeal hearing. At the hearing, Singh through his attorney, cross-examined the police officer involved in the sting operation who testified as to the youth decoy involved and presented argument why the suspension could not stand.

As to Singh's argument the city relied on "rank hearsay" to establish the minor's age and identity, violating his right to due process, it fares no better. Singh waived any right to challenge the finding of the minor's age when his attorney conceded the minor was under age 18. As to the minor's identity, Officer Lovano testified he personally observed the minor who was used as the decoy buy the pack of cigarettes from Singh who did not ask the minor for identification. The officer verified the minor's identity as the decoy by answering "Yes" when presented with a picture of the minor. Singh's attorney was then given the chance to cross-examine the officer. On this record, there was no due process violation.

DISPOSITION

The judgment is affirmed. The city is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

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ROBIE, Acting P. J.

We concur:

\_\_\_\_\_  
BUTZ, J.

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CANTIL-SAKAUYE, J.

## **Chapter 5.138 TOBACCO RETAILERS**

### **5.138.010 Legislative findings.**

The city council finds and determines that:

A. State law prohibits the sale or furnishing of cigarettes, tobacco products and smoking paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products by minors (Penal Code § 308).

B. State law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under eighteen (18) years of age (Business & Professions Code § 22956) and provides procedures for using persons under eighteen (18) years of age to conduct onsite compliance checks of tobacco retailers (Business & Professions Code § 22952).

C. State law requires that tobacco retailers post a conspicuous notice at each point of sale stating that selling tobacco products to anyone under eighteen (18) years of age is illegal (Business & Professions Code § 22952, Penal Code § 308).

D. State law prohibits the sale or display of cigarettes through a self-service display and prohibits public access to cigarettes without the assistance of a clerk (Business & Professions Code § 22962).

E. State law prohibits the sale of “bidis” (hand-rolled filterless cigarettes imported primarily from India and Southeast Asian countries) except at those businesses that prohibit the presence of minors. (Penal Code § 308.1).

F. State law prohibits the manufacture, distribution, or sale of cigarettes in packages of less than twenty (20) and prohibits the manufacture, distribution, or sale of “roll-your-own” tobacco in packages containing less than six tenths of an ounce of tobacco (Penal Code § 308.3).

G. State law prohibits public school students from smoking or using tobacco products while on campus, while attending school-sponsored activities, or while under the supervision or control of school district employees (Education Code § 48901(a)).

H. Sacramento City Code Section 5.140.040 prohibits the sale or distribution of tobacco products from vending machines.

I. In 2003, the Sacramento County Department of Health and Human Services Tobacco Education Program found that twenty-seven and four-tenths (27.4) percent of tobacco retailers sampled in the city of Sacramento unlawfully sold tobacco products to minors.

J. Eighty-eight (88) percent of adults who have ever smoked tried their first cigarette by the age of eighteen (18), and the average age at which smokers try their first cigarette is fourteen and a half (14½).

K. The city of Sacramento has a substantial interest in promoting compliance with federal, state, and local laws intended to regulate tobacco sales and use; in discouraging the illegal purchase of tobacco products by minors; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to minors; and in protecting children from being lured into illegal activity through the misconduct of adults.

L. California courts in *Cohen v. Board of Supervisors*, 40 Cal. 3d 277 (1985), and *Bravo Vending v. City of Rancho Mirage*, 16 Cal. App. 4th 383 (1993), have affirmed the power of local jurisdictions to regulate business activity in order to discourage violations of law.

M. State law authorizes local tobacco retailer licensing laws to provide for the suspension or revocation of the local tobacco retailer license for any violation of a state tobacco control law (Business & Professions Code § 22971.3).

N. A requirement for a tobacco retailer license will not unduly burden legitimate business activities of retailers who sell or distribute cigarettes or other tobacco products to adults. It will, however, allow the city to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco-related laws. (Ord. 2004-013 § 1 (part))

#### **5.138.020 Purpose.**

The purpose of this chapter is to encourage responsible tobacco retailing and to discourage violations of tobacco-related laws, especially those that prohibit or discourage the sale or distribution of tobacco products to minors, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalty provided for violations. (Ord. 2004-013 § 1 (part))

#### **5.138.030 Definitions.**

As used in this chapter, the following words and phrases shall have the meaning given them in this Section, unless the context clearly requires otherwise:

“City” means the city of Sacramento.

“City manager” means the city manager of the city of Sacramento or his or her designee.

“Itinerant tobacco retailing” means engaging in tobacco retailing at other than a fixed location.

“License” means a tobacco retailer license issued by the city pursuant to this chapter.

“Licensee” means any proprietor holding a license issued by the city pursuant to this chapter.

“Person” means any individual, firm, partnership, joint venture, limited liability company, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, or any other group or combination acting as a unit.

“Proprietor” means a person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a person has a ten (10) percent or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a person has, or can have, sole or shared control over the day-to-day operations of a business.

“Tobacco product” means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis or any other preparation of tobacco.

“Tobacco paraphernalia” means cigarette papers or wrappers, pipes, holders of smoking materials of all types, cigarette rolling machines and any other item designed or used for the smoking or ingestion of tobacco products.

“Tobacco retailer” means any person who sells, offers for sale, exchanges, or offers to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange.

“Tobacco retailing” means selling, offering for sale, exchanging, or offering to exchange for any form of consideration, tobacco, tobacco products, or tobacco paraphernalia without regard to the quantity sold, offered for sale, exchanged, or offered for exchange. (Ord. 2004-013 § 1 (part))

#### **5.138.040 Requirement for tobacco retailer license.**

A. It shall be unlawful for any person to act as a tobacco retailer without first obtaining a license for each location at which tobacco retailing is to occur. No license will be issued to authorize tobacco retailing at other than a fixed location. No license will be issued for itinerant tobacco retailing or tobacco retailing from vehicles.

B. Nothing in this chapter shall be construed to grant any person obtaining a license any status or right other than the right to act as a tobacco retailer at the location in the city identified on the face of the license, subject to compliance with all other applicable laws, regulations, and ordinances. Nothing in this chapter shall be construed to render inapplicable, supercede, or apply in lieu of any other provision of applicable law, including, without limitation, any condition or limitation on indoor smoking made applicable to business establishments by Labor Code Section 6404.5. (Ord. 2004-013 § 1 (part))

#### **5.138.050 Application procedure.**

All applications for a license shall be submitted to the city manager in the name of each proprietor proposing to conduct tobacco retailing and shall be signed by each proprietor or an authorized agent thereof. A proprietor proposing to conduct tobacco retailing at more than one location shall submit a separate application for each location. Every application shall be submitted on a form supplied by the city manager and shall contain the following information:

- A. The name, address, and telephone number of each proprietor;
- B. The business name, address, and telephone number of the fixed location for which a license is sought;
- C. Whether or not any proprietor has previously been issued a license pursuant to this chapter that is, or was at any time, suspended or revoked and, if so, the dates of the suspension period or the date of revocation; and
- D. Such other information as the city manager deems necessary for the administration or enforcement of this chapter. (Ord. 2004-013 § 1 (part))

#### **5.138.060 Issuance and renewal of license.**

A. Upon the receipt of an application for a license and the applicable license fee, the city manager shall issue a license unless:

- 1. The application is incomplete or inaccurate;
- 2. The application seeks authorization for tobacco retailing at an address that appears on a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings for violation of any of the provisions of this chapter; provided, however, this subparagraph shall not constitute a basis for denial of a license if either or both of the following apply:
  - a. The applicant provides the city with documentation demonstrating that the applicant has acquired or is acquiring the premises or business in an arm's length transaction. For the purposes of this subparagraph, an "arm's length transaction" is defined as a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for the primary purpose of avoiding the effect of the violations of this chapter that occurred at the location, is presumed not to be an "arm's length transaction";

b. It has been more than five years since the most recent license for that location was revoked;

3. The application seeks authorization for tobacco retailing that is unlawful pursuant to this code, or that is unlawful pursuant to any other local, state, or federal law; or,

4. The city manager has information that the applicant or his or her agents or employees has violated any local, state or federal tobacco control law at the location for which the license or renewal of the license is sought within the preceding thirty-day (30) period.

B. A license shall be valid for one year and must be renewed not later than thirty (30) days prior to the expiration of the license, but no earlier than sixty (60) days prior to the expiration of the license. Unless revoked on an earlier date, all licenses shall expire one year after the date of issuance. A license may be renewed for additional periods of one year by submitting an application to the city manager and payment of the applicable license fee; provided, however, a license that is suspended, has been revoked, or is subject to suspension or revocation proceedings shall not be renewed. The application and license fee shall be submitted at least thirty (30) days, but not more than sixty (60) days, prior to the expiration of the current valid license. The applicant shall follow all of the procedures and provide all of the information required by Section 5.138.050. The city manager shall process the application according to the provisions of this section.

C. Where the city manager does not approve a license or renewal of a license, the city manager shall notify the applicant of the specific grounds for the denial in writing. The notice of denial shall be served personally or by mail not later than five calendar days after the date of the denial. If by mail, the notice shall be placed in a sealed envelope, with postage paid, addressed to the applicant at the address as it appears on the application. The giving of notice shall be deemed complete at the time of deposit of the notice in the United States mail without extension of time for any reason. In lieu of mailing, the notice may be served personally by delivering to the person to be served and service shall be deemed complete at the time of such delivery. Personal service to a corporation may be made by delivery of the notice to any person designated in the Code of Civil Procedure to be served for the corporation with summons and complaint in a civil action. (Ord. 2004-013 § 1 (part))

#### **5.138.070 Display of license.**

Each license shall be prominently displayed in a publicly visible location at the licensed premises. (Ord. 2004-013 § 1 (part))

#### **5.138.080 License fee.**

The fee for issuance or renewal of a license shall be established by resolution of the city council and shall be in addition to the city's business operation tax and any other license or

permit fee imposed by this code upon the applicant. The license fee shall be paid to the city at the time the license application is submitted. (Ord. 2004-013 § 1 (part))

#### **5.138.090 License nontransferable.**

A license is nontransferable. If a licensee changes business location, that licensee must obtain a new license prior to acting as a tobacco retailer at the new location. If a business licensed to conduct tobacco retailing is sold, the new owner must obtain a license for that location before acting as a tobacco retailer. (Ord. 2004-013 § 1 (part))

#### **5.138.100 License violation.**

It shall be a violation of a license for a licensee or his or her agents or employees to violate any local, state, or federal tobacco-related law. (Ord. 2004-013 § 1 (part))

#### **5.138.110 Suspension or revocation of license.**

A. In addition to any other remedy authorized by law, a license shall be suspended or revoked as provided in this section, if the city manager finds that the licensee or his or her agents or employees has or have violated any of the provisions of this chapter; provided, however, violations by a licensee at one location may not be accumulated against other locations of that same licensee, nor may violations accumulated against a prior licensee at a licensed location be accumulated against a new licensee at the same licensed location.

1. Upon a finding by the city manager of a first license violation within any five-year period, the license shall be suspended for thirty (30) days.

2. Upon a finding by the city manager of a second license violation within any five-year period, the license shall be suspended for ninety (90) days.

3. Upon a finding by the city manager of a third license violation within any five-year period, the license shall be suspended for one year.

4. Upon a finding by the city manager of a fourth license violation within any five-year period, the license shall be revoked.

B. Notwithstanding Section 5.138.110(A), a license shall be revoked if the city manager finds that either one or both of the following conditions exist:

1. One or more of the bases for denial of a license under Section 5.138.060(A) existed at the time application was made or at anytime before the license issued.



2. The information contained in the license application, including supplemental information, if any, is found to be false in any material respect.

C. In the event the city manager suspends or revokes a license, written notice of the suspension or revocation shall be served upon the licensee within five days of the suspension or revocation in the manner prescribed in Section 5.138.060(B). The notice shall contain:

1. A brief statement of the specific grounds for such suspension or revocation;
2. A statement that the licensee may appeal the suspension or revocation by submitting an appeal, in writing, in accordance with the provisions of Section 5.138.120, to the city manager, within ten (10) calendar days of the date of service of the notice; and
3. A statement that the failure to appeal the notice of suspension or revocation will constitute a waiver of all right to an administrative appeal hearing, and the suspension or revocation will be final.

D. A licensee for whom a license suspension is in effect must remove all tobacco products and tobacco paraphernalia from public view at the address that appears on the suspended license. (Ord. 2004-013 § 1 (part))

#### **5.138.120 Denial, suspension and revocation—Appeals.**

A. Any applicant or licensee aggrieved by the decision of the city manager in denying, suspending, or revoking a license, may appeal the decision by submitting a written appeal to the city manager within ten (10) calendar days from the date of service of the notice of denial, suspension, or revocation. The written appeal shall contain:

1. A brief statement in ordinary and concise language of the specific action protested, together with any material facts claimed to support the contentions of the appellant;
2. A brief statement in ordinary and concise language of the relief sought, and the reasons why it is claimed the protested action should be reversed or otherwise set aside;
3. The signatures of all parties named as appellants and their official mailing addresses; and
4. The verification (by declaration under penalty of perjury) of at least one appellant as to the truth of the matters stated in the appeal.

B. The appeal hearing shall be conducted by a hearing examiner appointed pursuant to Section 8.04.070 of this code.

C. Upon receipt of any appeal filed pursuant to this Section, the city manager shall transmit said appeal to the secretary of the hearing examiner who shall calendar it for hearing as follows:

1. If the appeal is received by the city manager not later than fifteen (15) days prior to the next regular appeal hearing, it shall be calendared for hearing at said meeting.

2. If the appeal is received by the city manager on a date less than fifteen (15) days prior to the next appeal hearing, it shall be calendared for the next subsequent appeal hearing.

D. Written notice of the time and place of the hearing shall be given at least ten (10) calendar days prior to the date of the hearing to each appellant by the secretary of the hearing examiner either by causing a copy of such notice to be delivered to the appellant personally or by mailing a copy thereof, postage prepaid, addressed to the appellant at the address shown on the appeal.

E. Failure of any person to file a timely appeal in accordance with the provisions of this section shall constitute an irrevocable waiver of the right to an administrative hearing and a final adjudication of the notice and order, or any portion thereof.

F. Only those matters or issues specifically raised by the appellant in the appeal notice shall be considered in the hearing of the appeal.

G. Any suspension or revocation of a license shall be stayed during the pendency of an appeal which is properly and timely filed pursuant to this section. (Ord. 2004-013 § 1 (part))

#### **5.138.130 Hearings—Generally.**

A. At the time set for hearing, the hearing examiner shall proceed to hear the testimony of the city manager, the appellant, and other competent persons, including members of the public, respecting those matters or issues specifically listed by the appellant in the notice of appeal.

B. The proceedings at the hearing shall be electronically recorded. Either party may provide a certified shorthand reporter to maintain a record of the proceedings at the party's own expense.

C. The hearing examiner may, upon request of the appellant or upon request of the city manager, grant continuances from time to time for good cause shown, or upon his or her own motion.

D. In any proceedings under this chapter, the hearing examiner has the power to administer oaths and affirmations and to certify to official acts. (Ord. 2004-013 § 1 (part))

#### **5.138.140 Conduct of hearing.**

A. Hearings need not be conducted according to the technical rules relating to evidence and witnesses. Government Code Section 11513, subsections (a), (b) and (c) as presently written or hereinafter amended shall apply to hearings under this chapter.

B. Oral evidence shall be taken only upon oath or affirmation.

C. Irrelevant and unduly repetitious evidence shall be excluded.

D. Each party shall have these rights, among others:

1. To call and examine witnesses on any matter relevant to the issues of the hearing;
2. To introduce documentary and physical evidence;
3. To cross-examine opposing witnesses on any matter relevant to the issues of the hearing;
4. To impeach any witness regardless of which party first called the witness to testify;
5. To rebut the evidence presented against the party; and
6. To represent himself, herself, or itself or to be represented by anyone of his, her, or its choice who is lawfully permitted to do so.

E. In reaching a decision, official notice may be taken, either before or after submission of the case for decision, of any fact that may be judicially noticed by the courts of this state or that may appear in any of the official records of the city or any of its departments. (Ord. 2004-013 § 1 (part))

#### **5.138.150 Form and contents of decision—Finality of decision.**

A. If it is shown, by a preponderance of the evidence, that one or more bases exist to deny, suspend, or revoke the license, the hearing examiner shall affirm the city manager's decision to deny, suspend, or revoke the license. The decision of the hearing examiner shall be in writing and shall contain findings of fact and a determination of the issues presented.

B. The decision shall inform the appellant that the decision is a final decision and that the time for judicial review is governed by California Code of Civil Procedure Section 1094.6. Copies of the decision shall be delivered to the parties personally or sent by certified

mail to the address shown on the appeal. The decision shall be final when signed by the hearing examiner and served as provided in this section. (Ord. 2004-013 § 1 (part))

#### **5.138.160 Enforcement.**

A. In addition to any other remedy, any person violating any provision of this chapter shall be guilty of a misdemeanor for each day such violation continues.

B. Any violation of this chapter may be remedied by a civil action brought by the city attorney. The city may recover reasonable attorneys fees and costs of suit in any civil action brought by the city attorney to remedy any violation of this chapter.

C. Any person violating the provisions of this chapter shall also be liable for civil penalties of not less than two hundred fifty dollars (\$250.00) or more than twenty-five thousand dollars (\$25,000.00) for each day the violation continues.

D. Violations of this chapter are hereby declared to be public nuisances subject to abatement by the city.

E. In addition to criminal sanctions, civil penalties as provided in this section, and other remedies set forth in this chapter, administrative penalties may be imposed pursuant to Chapter 1.28 against any person violating any provision of this chapter. Imposition, enforcement, collection and administrative review of administrative penalties imposed shall be conducted pursuant to Chapter 1.28. (Ord. 2004-013 § 1 (part))

#### **5.138.170 Severability.**

If any section, subsection, subdivision, paragraph, sentence, clause, or phrase in this chapter or any part thereof is for any reason held to be unconstitutional or invalid or ineffective by any court of competent jurisdiction, that decision shall not affect the validity or effectiveness of the remaining portions of this chapter or any part thereof. The city council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase thereof irrespective of the fact that any one or more subsections, subdivisions, paragraphs, sentences, clauses, or phrases be declared unconstitutional, or invalid, or ineffective. (Ord. 2004-013 § 1 (part))